RECORD AND BRIEFS

No. 16-1161

In The
Supreme Court of the United States

BEVERLY R. GILL, ET AL.,

Appellants,

v.

WILLIAM WHITFORD, ET AL.,

Appellees.

On Appeal From The United States District Court For The Western District Of Wisconsin

BRIEF OF THE GEORGIA STATE CONFERENCE OF THE NAACP, LAVELLE LEMON, MARLON REID, CELESTE SIMS, PATRICIA SMITH, AND COLEY TYSON AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF THE *AMICI CURIAE*[1]

The Georgia State Conference of the National Association for the Advancement of Colored People (NAACP) was formed in 1941 to eliminate racial discrimination through democratic processes and ensure the equal political, educational, social, and economic rights of all persons, in particular African-Americans. The Georgia NAACP, Lavelle Lemon, Marlon Reid, Celeste Sims, Patricia Smith, and Coley Tyson (Georgia redistricting plaintiffs) have brought a redistricting lawsuit in the United States District Court for the Northern District of Georgia. *See generally Georgia State Conference of the NAACP, et al. v. State of Georgia, et al.*, ___ F. Supp. 3d ___, 2017 WL 3698494 (Aug. 25, 2017). The Georgia redistricting plaintiffs' claims include the allegation that the 2015 mid-census cycle redrawing of Georgia State House Districts 105 and 111 is an unconstitutional partisan gerrymander. On August 25, 2017, a three-judge panel dismissed that count for failure to provide a judicially-manageable standard with respect to the alleged discriminatory effect. *Id.* at *12-13. The Georgia redistricting plaintiffs have an interest in the instant appeal because it raises foundational issues related to the justiciability and standard of review for partisan gerrymandering cases,

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[1] No counsel for a party has authored this brief in whole or in part, and no counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of *amicus* briefs.

directly impacting the adjudication of their constitutional rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

For over three decades, a majority of the Court has ruled that partisan gerrymander cases are justiciable, a conclusion consistent with the cognate apportionment cases. There appears to be no precedent for this Court to remove a category of cases from justiciability to non-justiciability. To do so would be particularly anomalous in the face of the universal acknowledgement, among jurists and legal commentators, that partisan gerrymandering is incompatible with our democracy because it denies voters a reasonable opportunity to elect representatives of their choice, and allows representatives to disregard these voters.

Partisan gerrymanders, and their attendant evils, come in many guises. It is therefore not only important for this Court to hold that partisan gerrymander cases are justiciable with respect to a statewide apportionment, but also to recognize that the evils wrought by this conduct may be accomplished subtly, with surgical precision targeted at a single district to accomplish a similarly anti-democratic end. In 2015, the Republican-controlled Georgia legislature carefully manipulated the lines of two swing districts in the State House of Representatives, Districts 105 and 111. *See Georgia State Conf. of the NAACP v. State of Georgia*, ___

F. Supp. 3d ___, 2017 WL 3698494, at *2 (Aug. 25, 2017) (three-judge panel). Elections in both districts were very close in 2012 and 2014, and their demographics were shifting to the disadvantage of the white, Republican incumbents. *See id.* at *2-3. The 2015 changes, in aggregate, moved African-American voters out of and white voters into both districts. There was a net gain of 2,191 non-Hispanic white residents in District 105, according to 2010 Census data, while there was a net loss of 1,137 non-Hispanic African-American and 1,073 Hispanic residents in District 105. In District 111, there was a net gain of 1,335 non-Hispanic white residents, and a net loss of 1,251 non-Hispanic African-American and 277 Hispanic residents.[2] *Id.*

This dilutive redistricting accomplished its goal. In 2016, the white, Republican incumbents in both districts narrowly defeated their black, Democratic challengers – in one case by 222 votes. Nevertheless, a federal court has dismissed a partisan gerrymandering claim against Georgia, on the basis that the plaintiffs failed to plead a "metric" by which to measure discriminatory effect such as disproportionality, asymmetry, or efficiency gaps. *See Georgia State Conf. of the NAACP*, 2017 WL 3698494, at *12-13. However, these metrics are relevant only to a statewide analysis and are not applicable to a district-specific challenge. A

[2] *Amici* are not asking the Court to adjudicate the Georgia redistricting case, because it is not before the Court. Rather, they are positing the facts alleged in that case, as if true, for the purpose of providing the Court with a real-life example of a pinpoint gerrymander so as to demonstrate one of the other forms of partisan gerrymanders.

pinpoint redistricting, however, can violate constitutional principles as much as a statewide partisan gerrymander. Any standard or standards adopted by this Court must be flexible enough so as to apply to both. Accepting the justiciability of partisan gerrymandering cases but adopting rules that effectively permit subtler but equally pernicious forms of gerrymandering would allow democracy to die by a thousand cuts.

The sole basis for doubt as to the justiciability of partisan gerrymandering cases is the purported lack of "judicially-manageable standards" to guide resolution of these cases, a concept derived from the "political question" cases. There is, however, an accepted, overarching, judicially-manageable standard applicable to these cases: whether the line-drawing was done with the invidious intent to minimize the voting strength of a group of voters. This standard has been a staple of Equal Protection apportionment cases. It is sufficiently flexible to apply both to a statewide redistricting plan like that in Wisconsin and a pinpoint redistricting plan like that in Georgia. Moreover, there is an accepted method of proving invidiousness, applying the standards set forth in *Village of Arlington Heights*. Moreover, accepted factors such as discriminatory impact, the use of race to achieve partisan ends, and modification of a plan mid-decade are indicia of invidiousness in line-drawing. Indeed, clarification that the use of race as a tool to effect a partisan gerrymander is an indicium of invidiousness is necessary to dispel the notion that jurisdictions can use partisanship as a defense to pernicious racial gerrymanders.

A robust invidiousness standard allows for the necessary flexibility and the evolution of subsidiary standards. Since partisan gerrymandering cases come in different forms, there is no need for the Court to announce, in this case, the precise subsidiary standards that must be met in all future cases. Indeed, it would be a mistake to do so, because one subsidiary standard cannot possibly fit all gerrymanders. The same subsidiary standards may not necessarily apply to a statewide post-census redistricting as to a mid-decade manipulation of a handful of districts. For example, while quantitative measures such as disproportionality, asymmetry, or an efficiency gap may be corroborative of invidiousness in a statewide redistricting, they are not relevant in a pinpoint gerrymander of one or a handful of districts, such as the one at issue in Georgia.

The courts, guided by judicially-manageable standards, may devise the subsidiary standards on a case-by-case basis, as they evolve over time, precisely the way other constitutional jurisprudence has developed. The stronger the evidence of invidiousness, the sounder the basis for the Court to determine that the impact of the line-drawing is caused by an unconstitutional intent to minimize the voting strength of a particular political element.

ARGUMENT

I. Partisan Gerrymandering Claims Are Justiciable

For over three decades, a majority of the Court has ruled that partisan gerrymander cases are justiciable. *Davis v. Bandemer*, 478 U.S. 109, 118-27 (1986); *Vieth v. Jubelirer*, 541 U.S. 267, 307-68 (2004) (Kennedy, J., concurring; Stevens, J., Souter, J., Ginsburg, J. Breyer, J., dissenting). The justiciability of these cases is consistent with the Court's ruling in *Baker v. Carr*, 369 U.S. 186 (1962), that cases brought under the Fourteenth Amendment challenging the constitutionality of redistricting decisions did not present non-justiciable "political questions."

The plurality in *Vieth*, who opined that partisan gerrymander claims were not justiciable because of the lack of "judicially-manageable standards," provided not a single example where this Court had moved a category of cases previously ruled justiciable into the non-justiciable category. *Amici* are unaware of a comparable decision. Barring the judicial review of partisan gerrymandering claims would be particularly anomalous because this Court has itself stated that partisan gerrymanders are incompatible with democratic principles. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) (alterations in original) (*quoting Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion)).

This is because such conduct goes "to the adequacy of representation," *Bandemer*, 478 U.S. at 125. From

the voter's perspective, partisan gerrymandering has been characterized as denying a particular group "its chance to effectively influence the political process," *id.* at 132-33, and an effective opportunity to elect representatives of their choice in violation of the Equal Protection Clause. *Id.* at 167-68 (Powell, J., concurring and dissenting). Justice Souter has described it as a "fairness" issue, deviating from the constitutional standard that each political group is supposed to have the same chance to elect their representatives. *Vieth*, 541 U.S. at 343 (Souter, J., dissenting).

To others, the problem is "conceding to legislatures a power of self-selection," which is in tension with a Constitution "whose most arresting innovation was the dispersion of power." Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a procedural Safeguard against Partisan Gerrymandering*, 9 Yale L. & Pol'y Rev. 301, 304 (1991). Justice Stevens believes that the practice violates the decision-maker's duty to remain impartial. *Vieth*, 541 U.S. at 326 (Stevens, J., dissenting). Justice Kennedy has suggested that partisan gerrymandering may raise First Amendment issues because political classifications are used "to burden a group's representational rights." *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring in the judgment).

Regardless of whether the constitutional source of the right is the First or the Fourteenth Amendment, authorities agree that the consequences of partisan gerrymandering are profound. Lawmakers may choose their voters for the purpose of ensuring a near-certain

result, which allows elected officials to disregard the citizenry's needs and concerns. Laughlin McDonald, *The Looming 2010 Census: A Proposed Judicially-Manageable Standard and Other Reform Options for Partisan Gerrymandering*, 46 Harv. J. on Legis. 243, 244 (2009). This in turn leads to the voters being denied an "effective voice in policy making," and the ability to protect their rights. *Id.* Even worse, as one commentator has said, "districts intentionally designed to subordinate voters based on party preference are more likely to actually suppress representation of that political viewpoint, whether that suppression is measurable or not." Justin Levitt, *Intent Is Enough: Invidious Partisanship in Redistricting*, 59 Wm. & Mary L. Rev. ___, pp. 34-35 (forthcoming 2017).

Partisan gerrymandering is not going away, and it is not owned by one particular political party. One federal judge has described Maryland Democrats' congressional redistricting plan as politically motivated "nefarious activity."[3] The three-judge panel hearing a challenge to that plan agrees that the segregation of voters by political affiliation for partisan ends is "noxious" and "repugnant to representative democracy." *Benisek v. Lamone*, No. 1:13-cv-03233-JKB, 2017 WL 3642928, at *14 (D. Md. Aug. 24, 2017); *see also id.* at *15 (Niemeyer, J., dissenting) (concluding that "the

[3] Ann E. Marimow & Josh Hicks, *Judges in Md. redistricting case decry politically motivated electoral map*, THE WASHINGTON POST, July 14, 2017, *available at* https://www.washingtonpost.com/local/public-safety/judges-in-md-redistricting-case-decry-politically-motivated-electoral-map/2017/07/14/33b44fc2-6814-11e7-9928-22d00a47778f_story.html?utm_term=.1f85c92384f5.

record could not be clearer that the mapmakers specifically intended to dilute the effectiveness of Republican voters in the Sixth Congressional District and that the actual dilution that they accomplished was caused by their intent."). In North Carolina, where the state legislature must redraw congressional and state legislative districts struck down as racial gerrymanders, House Rules Chairman David Lewis has publicly suggested that a partisan gerrymander is forthcoming, stating that, "[t]he entire process of where lines are drawn – every result from where a line's drawn – will be an inherently political thing."[4]

Partisan gerrymanders come in various guises, although they perpetuate the same evils. While the instant case centers on statewide redistricting, the Georgia redistricting case focuses on a limited number of districts. Of the 7,556 residents surgically moved from Georgia State House District 105 into a neighboring safe Republican district, 2010 Census data indicates that 63.8 percent are African-American or Hispanic; they were replaced by 7,380 residents, of whom only 35.6 percent are African-American or Hispanic. *See Georgia State Conf. of the NAACP*, 2017 WL 3698494, at *2. With respect to District 111, more than 30,000 residents were shuttled in and out of four adjoining districts, increasing the white population percentage

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[4] Travis Fain & Laura Leslie, *Redistricting criteria call for partisan maps, no consideration of race*, WRAL, Aug. 10, 2017, *available at* http://www.wral.com/redistricting-criteria-call-for-partisan-maps-no-consideration-of-race/16871238/.

by 2.3 percentage points, and decreasing the non-Hispanic African-American percentage by the same amount. *Id.* at *3. These changes, while relatively small in comparison to a statewide apportionment, had a decisive effect in countering the demographic shifts in the populations of Districts 105 and 111. *Id.* at *2-3.

The reason is obvious: the State House elections in both districts in 2012 and 2014 were close and featured racially polarized voting patterns, both districts were experiencing an increase in the registered voter percentage due to demographic changes, and minority voters are perceived as reliably supporting Democratic State House candidates. *Id.* The Republican-dominated Georgia legislature did not want to risk the incumbents in either district losing to a Democratic challenger. The Legislature accomplished its goal by splitting precincts and moving census blocks, for which there are racial data but no electoral information. *See id.* at *12. Moreover, reflecting the hurried and secret nature of this legislation, the adoption of H.B. 566 did not follow the normal legislative procedures. African-American legislators serving on the House Legislative and Congressional Reapportionment and the Senate Reapportionment and Redistricting Committees were excluded from the process of drawing and negotiating the plans ultimately codified in H.B. 566. *Id.* at *2.

The November 2016 races for House District 105 and 111 were each close and proved just how effective these changes could be in district elections. In 2016, the white, Republican incumbents in both districts again ran against African-American candidates who

were Democrats. *Id.* at *2-3. Despite the adjustments made by the legislature to tilt the outcome and the presence of racially polarized voting patterns, the margins remained uncomfortably close. *See id.* In the election for House District 105, the margin of victory was so close that the race went to recount. The incumbent ultimately defeated her challenger by only 222 votes. *Id.* at *2. In House District 111, the incumbent's margin of victory in that election was only 946 votes, an even tighter result than in past races. *Id.* at *3. But for H.B. 566, and the mid-decade redistricting, African-American Democrats would likely have won both races in these districts. *Id.* at *2-3.

The minority voters in these districts have therefore been deprived of their chance to have an effective voice and to influence their representatives because of their race and presumed political affiliation. It cannot be the law that it is constitutional for one political party to make a series of incremental changes designed for one purpose and one purpose only: to stack the deck by moving opposing party members out of one district and into another whenever an election becomes close. That is the antithesis of a true democracy. Unless partisan gerrymandering cases are justiciable, the Court is consigning democracy to die by a thousand cuts. Clearly, partisan gerrymandering is an area where the Court must exercise its paramount authority "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

II. Invidious Intent to Minimize the Voting Power of a Political Element Is a Judicially-Manageable Standard

The sole basis for doubt as to the justiciability of partisan gerrymandering cases is the purported lack of "judicially-manageable standards" to guide resolution of these cases. *See, e.g.*, *Vieth*, 541 U.S. 267, 277-90 (plurality opinion). However, the overarching standard of an invidious intent to minimize the voting strength of a group of voters is a time-tested, judicially-manageable standard.

The concept that justiciability is contingent on the availability of judicially-manageable standards finds its genesis in *Baker v. Carr*, 369 U.S. 186 (1962), where the Court distinguished the "political questions" inherent in cases brought under the Guaranty Clause[5] from those implicated in cases brought under the Fourteenth Amendment, such as partisan gerrymandering cases. In the former, the Court explained that it had not been able to identify a "set of judicially manageable standards which courts could utilize independently in order to identify a State's lawful government." *Id.* at 223.[6] Discrimination claims brought under the Fourteenth Amendment, however, do not face this obstacle:

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[5] The Guaranty Clause requires the federal government to "guarantee to every State in the Union a Republican Form of Government." U.S. Const. art. IV, § 4.

[6] The leading Guaranty Clause case in this respect is *Luther v. Borden*, 48 U.S. 1 (1849), where, in the face of the Dorr Rebellion, the Court was asked to rule in effect that Dorr's alternative

> Nor need the appellants, in order to succeed in this [Equal Protection] action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if, on the particular facts, they must, that a discrimination reflects no policy, but simply arbitrary and capricious action.

369 U.S. at 226.

A. Invidiousness Is an Accepted, Judicially-Manageable Standard

The settled benchmark for discrimination claims brought under the Equal Protection Clause is invidiousness. *See, e.g.*, *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968) (noting that "we have . . . held that 'invidious' distinctions cannot be enacted without a violation of the Equal Protection Clause."). This Court has consistently applied this standard to various types of Equal Protection challenges to redistricting, including racial gerrymandering, one person one vote, and vote dilution

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government was lawful, superseding Rhode Island's charter government, because the latter limited the vote to landowners. Chief Justice Taney, writing for the Court, rejected the claim, and, in so doing, created the "political question" doctrine. The decision, of course, predated the enactment of the Fourteenth Amendment.

claims.[7] In the past, this Court has also suggested that invidiousness is relevant to the analysis of partisan gerrymandering claims.[8] A standard emphasizing the offensiveness of the line-drawers' conduct is consistent with the Court's traditional usage of "invidiously discriminatory animus," as acknowledged by Justice Scalia in his discussion of that phrase by this Court in *Griffin v. Breckenridge*, 403 U.S. 88 (1971):

> The nature of the 'invidiously discriminatory animus' *Griffin* had in mind is suggested both by the language used in that phrase ("invidious . . . [t]ending to excite odium, ill will, or envy; likely to give offense; esp., unjustly and irritatingly discriminating," Webster's Second International Dictionary 1306 (1954)) and by

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[7] *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 656-66 (1964) (a redistricting plan impairs Fourteenth Amendment rights if it employs "invidious discriminations based upon factors such as race or economic status."); *Rogers v. Lodge*, 458 U.S. 613, 622 (1982) (declining to "disturb the District Court's finding that the at-large system in Burke County was being maintained for the invidious purpose of diluting the voting strength of the black population").

[8] *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973) (multimember districts "may be vulnerable" to constitutional challenges "if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized."); *Davis v. Bandemer*, 478 U.S. 109, 124 (1986) (noting that "[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race. . . .") (*quoting Reynolds*, 377 U.S. at 565-66); *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring in the judgment) (a redistricting plan constitutes an unconstitutional partisan gerrymander if political classifications "were applied in an invidious manner or in a way unrelated to any legitimate legislative objective.").

> the company in which the phrase is found ("there must be *some racial, or perhaps otherwise class-based*, invidiously discriminatory animus," *Griffin*, 403 U.S., at 102, 91 S. Ct., at 353 (emphasis added)).

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 274 (1993).[9]

B. The Invidiousness Standard Must Be Applied in a Manner Sufficiently Flexible to Cover a Variety of Political Gerrymanders

The difference between the Wisconsin statewide post-census redistricting and the mid-decade district-specific manipulation that occurred in Georgia in 2015 demonstrates the need for flexibility in the applicability of the invidiousness standard. For example, the district court in this case employed a standard requiring that the legislature possess "an intent to entrench a political party in power" for the remainder of the decade, or "to make the political system systematically

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[9] Similarly, invidiousness is the standard applicable to claims of discriminatory burdens in violation of the First Amendment, which the district court here, and Justice Kennedy have posited as the appropriate constitutional basis for political gerrymandering claims. *See Whitford v. Gill*, 218 F. Supp. 3d 837, 883 (W.D. Wis. 2016); *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring); *and see Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) ("[w]here the claim is invidious discrimination in contravention of the First . . . Amendment[], our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose.").

unresponsive to a particular segment of the voters based on their political preference." *Whitford*, 218 F. Supp. 3d 837, 887 & n. 170, 896 (W.D. Wis. 2016). Plaintiffs offered various statistical models to support their claim, including an "efficiency gap" analysis which quantified the "wasted" votes of the parties, *i.e.*, those not needed to win a race and those wasted on losing races, on a statewide basis.

The entrenchment standard and quantitative methods such as the efficiency gap analysis may be applicable when adjudicating a statewide redistricting plan. They are not necessarily applicable in smaller-scale, subtler, yet equally invidious gerrymanders, such as the pinpoint, mid-census redistricting enacted for the purpose of making a handful of highly competitive districts safer for incumbents of a political party that was already enjoying a super-majority, as occurred in Georgia in 2015. In cases such as that, the evil is the simple practice of stacking the deck incrementally in a particular district, a concept the Court has recognized in its racial gerrymandering jurisprudence. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1481-82 (May 22, 2017) (North Carolina Congressional Districts 1 and 12 were racially gerrymandered); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (Mar. 1, 2017) (analyzing whether race predominated in drawing 11 of 12 Virginia House of Delegate districts); *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1264 (2015) (holding that analyzing racial gerrymandering in the context of the state "as a whole" is legally erroneous and the district court erred in

concluding that race did not predominate in the creation of Alabama Senate Districts 7, 11, 22, or 26).

Where particular districts have been subjected to partisan gerrymandering, a standard different than "entrenchment" should apply. Fortunately, this Court has already created that standard. In *Burns v. Richardson*, a one person, one vote case, the Court defined a multi-member apportionment scheme as having a discriminatory effect if it is shown that, "'designedly or otherwise . . . under the circumstances of a particular case, [it] would operate to minimize or cancel out the voting strength of racial *or political elements* of the voting population'" (emphasis added). 384 U.S. 73, 88 (1966) (*quoting Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)). This standard is consistent with this Court's pronouncements in partisan gerrymandering cases that an electoral district "may be vulnerable" to constitutional challenges "if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized," *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973), and that "each political group in a State should have the same chance to elect representatives of its choice as any other political group." *Bandemer*, 478 U.S. at 124.

A standard focused on an invidious intent to minimize or cancel out the votes of certain elements of the voting population based on their political association is more rigorous than the "mere intent to disadvantage" standard offered by the plurality in *Davis v.*

Bandemer, 478 U.S. 109 (1986).[10] It also provides courts with the flexibility needed to apply to both statewide or pinpoint gerrymanders because the affected "elements of the voting population" can be located in a single district or throughout the state.

The Court should set a standard in this statewide gerrymandering case that is sufficiently broad and flexible to apply to cases such as that presented by Georgia's pinpoint gerrymander. If not, the Court should make clear that the unique circumstances surrounding pinpoint redistricting necessitate a different framework from the one used in statewide gerrymandering cases.

C. There Is a Settled Method of Proving Invidiousness Applicable to Partisan Gerrymandering Cases

Not only has the overarching legal standard of invidiousness been firmly established in discriminatory intent claims, but this Court has set clear guidelines for approaching proof of invidiousness through both direct and circumstantial evidence. *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 266-68 (1977). These factors include the impact of the official action, the specific sequence of events leading up to the challenged decision, departures from the normal procedural and substantive departures from typical methods and manners of

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[10] *Vieth*, 541 U.S. at 284 (plurality opinion) (characterizing the standard offered by the *Bandemer* plurality).

decision-making, and legislative and administrative history, including contemporary statements by members of the decision-making body. *Id.*

Having regularly applied the *Arlington Heights* factors, courts are seasoned in delving into the invidiousness of alleged discriminatory practices. Invidiousness bears all of the hallmarks of a judicially-manageable standard.

D. There Are Accepted Factors That Go to Proof of Invidiousness

Case law provides ample examples of the sort of objective facts that can contribute to a finding of invidious intent to discriminate on account of political affiliation. These include not only express statements of decision-makers to that effect, but also trial-tested evidence such as disproportionate impact, using race as a proxy for party, deviating from traditional districting principles, redistricting in the middle of a census cycle, and other forms of manipulation that indicate the decision-maker strayed from typical procedures or made substantive choices that furthered no legitimate governmental interest. *See, e.g.*, *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 422 (2006) (addressing appellants' contention that the Texas Legislature "intentionally sought to manipulate" districts through their population variances). Of course, not all of these elements are going to be present in every case, but some salient factors are laid out below.

1. Discriminatory Impact

Disproportionality in the results of statewide elections – *i.e.*, the gap between a party's vote share and seat share in a state – does not in of itself prove an unconstitutional statewide partisan gerrymander. *Bandemer*, 478 U.S. at 130-31. However, when combined with other factors, it can support the conclusion of an invidious intent to minimize the voting strength of a discrete political element. The same is true of other statewide measures of impact such as asymmetry (the extent to which the percent of votes of one party does not translate to the percent of votes achieved by the opposing party) or the efficiency gap.

Such statewide measures of impact, however, are not applicable to pinpoint gerrymanders, as the measure of impact corroborative of invidiousness does not involve a comparison with other districts, but only the actual, or projected election result. The Georgia pinpoint redistricting serves as an example. In 2012 and 2014, white, Republican incumbents barely beat Black Democrats in districts where the minority registered voter percentage was steadily increasing due to demographic changes. In 2015, the Legislature responded by cutting neighborhoods of Black Democratic voters out of those districts. *See Georgia State Conf. of the NAACP*, 2017 WL 3698494, at *12. A quantification of statewide disproportionality, asymmetry, or efficiency gap would not instruct on the discriminatory impact of the line-drawing. Rather, the proof of impact would be in the form of past election results and projected future

election results, *i.e.*, showing that elections were tight, that specific groups were targeted for exclusion or inclusion in the district, and that the line-drawing party continued to win, or could be projected to win. *See Bandemer*, 478 U.S. at 141 (plurality opinion) (combining the district configurations "with vote projections to produce future election results. . . .").

2. The Use of Race to Achieve a Partisan End in Line-Drawing

The use of race as a proxy for partisan goals has been a recurring theme in redistricting litigation over the years, which shows no sign of abating.[11] Unfortunately, this is precisely what the Georgia Legislature

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[11] *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1476-77 (May 22, 2017) (rejecting State claim that politics alone drove drawing of congressional district, not race); *LULAC v. Perry*, 548 U.S. 399, 440 (2006) (rejecting State's claim that redrawing of Congressional district was primarily for political, not racial, reasons); *Perez v. Abbott*, No. 5:11-cv-00360-OLG-JES-XR, 2017 WL 3495922 at *41 (W.D. Tex. Aug. 15, 2017) (describing State's purpose of adding significant population from Travis County into Congressional District 35 was "to use race as a tool for partisan goals."); *id.*, 2017 WL 1450121 at *14-16 (W.D. Tex. Apr. 20, 2017) (rejecting State's excuse that increasing or maintaining the Spanish surname voter percentage while simultaneously and intentionally minimizing Latino voters' ability to elect in State House Districts 78 and 117 was partisan gerrymandering"); *id.*, 2017 WL 962947, at *59 (W.D. Tex. Mar. 10, 2017) (describing "mapdrawers as willing to disadvantage minorities to gain partisan advantage . . . and that they were willing to use race to gain partisan advantage . . . and limit the number of Democrat districts overall").

did when redrawing Georgia State House of Representatives Districts 105 and 111 in 2015. *See Georgia State Conf. of the NAACP*, 2017 WL 3698494, at *12.

Employing the use of race to further partisan interests is per se evidence of an invidious politically discriminatory intent. This may occur by using racial data as a proxy for partisan performance, intentionally packing or cracking minority communities, using arbitrary numerical racial thresholds not based on evidence of minority voters' ability to elect, splitting voting precincts or voting tabulation districts and using racial data, artificially inflating the minority percentage in a low-turnout district to benefit the other political party, or other means.

It is important for the Court to clarify that using race as a proxy for party is an indicium of invidiousness in partisan gerrymander cases, because courts have not been uniform in their response to the defense of partisanship in racial discrimination cases.[12]

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[12] *See, e.g., Miller v. Johnson*, 515 U.S. 900, 914 (1995) (stating that the "use of race as a proxy" for "political interest[s]" is "prohibit[ed]"); *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 440 (2006) (finding that the Texas redistricting plan bore "the mark of intentional discrimination" on the basis of race when the legislature used racial considerations to achieve a partisan result); *Veasey v. Abbott*, 830 F.3d 216, 241 (5th Cir. 2016) (en banc) (discussing that the rapid increase in minority populations in Texas such that "the party currently in power is 'facing a declining voter base and can gain partisan advantage' through a strict voter ID law" was evidence that could support a finding of intentional discrimination based on race); *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016) (stating that "intentionally targeting a particular race's access to the franchise

Discriminating on the basis of race to achieve a partisan goal should not be a defense against a racial discrimination claim. Even if partisanship were a legitimate goal, targeting a suspect class as the means of achieving that goal is unconstitutional. *See, e.g.*, *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (June 19, 2017) (holding that a North Carolina law preventing sex offenders from using social media for the purpose of protecting vulnerable victims was unconstitutional because it was unnecessarily burdensome on First Amendment rights); *Price Waterhouse v. Hopkins*,

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because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose"); *Perez v. Abbott*, 2017 WL 962947, at *63 (W.D. Tex. Mar. 10, 2017) (finding that the redistricting plan was intentionally discriminatory because the legislature drew the plan on the basis of race "using race as a proxy for voting behavior"); *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 727-28 (S.D. Tex. Jan. 6, 2017) (finding that "[b]y clearly and explicitly intending to diminish Latinos' voting power for partisan ends, Pasadena officials intentionally discriminated on the basis of race"); *contra Rodriguez v. Harris Cty., Tex.*, 964 F. Supp. 2d 686, 804 (S.D. Tex. 2013) (declining to find racial considerations "steered the redistricting process" because "proclivities" of Latinos to vote Democratic and Anglos to vote Republican, "without more, cannot transform partisanship into race discrimination"); *Cano v. Davis*, 211 F. Supp. 2d 1208, 1248 (C.D. Cal. 2002) (California legislature had non-racial goals such as "protecting incumbents" and "advancing partisan interests" and the redistricting plan was therefore not intentionally discriminatory); *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1296-98 (S.D. Fla. 2002) (finding that the "Republican-controlled legislature intended to maximize the number of Republican congressional and legislative seats through the redistricting process" and engaged in a "raw exercise of majority legislative power" but did not intentionally discriminate on the basis of race).

490 U.S. 228, 241 (1989) (identifying the standard under Title VII when a plaintiff proves that her gender played a motivating part in an employment decision); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (Nebraska law prohibiting teaching any language other than English through eighth grade, enacted to promote civic development, violated the Fourteenth Amendment). In the context of a partisan gerrymandering claim, it is itself an indication that the jurisdiction is acting unconstitutionally.

3. Modifying a Plan Mid-Decade

If a legislature modifies a legitimately drawn, legislatively-enacted plan compliant with the one person, one vote principle, and enacts an unnecessary mid-census redistricting plan solely for the purpose of making swing districts less competitive to the benefit of the party in power, that is an indicium of an invidious partisan motive.

Again, the 2015 Georgia State House redistricting plan is an instructive example of a mid-census redistricting enacted with such an invidious intent. There, the Georgia Legislature needlessly redrew district boundaries that complied with the one person, one vote principle and had survived scrutiny by the Department of Justice. *See Georgia State Conf. of the NAACP*, 2017 WL 3698494, at *2. Its purpose in doing so was to move the goal posts to help white Republican incumbents who had narrowly defeated black Democratic challengers in swing districts that were experiencing

an increase in minority voter registration percentage due to demographic changes.[13] *Id.* at *2-3. In the case of State House District 105, Representative Joyce Chandler won by 554 votes in 2012 and 789 votes in 2014, and has since acknowledged that her district is becoming increasingly "diverse," while adding that the Legislature acted without her asking for any special redistricting help.[14] In the 2016 election, under the new lines, Chandler prevailed by 222 votes. *See id.* at *2.

III. A Robust Invidiousness Standard Allows for Necessary Flexibility and Evolution of Subsidiary Standards

Partisan gerrymandering claims do not present an absence of judicially-manageable standards, but, rather, as Justice Kennedy has termed it, a search for

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[13] While this Court confirmed in *League of United Latin American Citizens v. Perry* (*LULAC*) that the Constitution does not prohibit mid-decade redistricting per se, mid-decade modifications of the swing districts by the same party that drew the lines merit scrutiny, particularly when that party has already achieved super-majority status, the facts of the Georgia redistricting are distinguishable from those in *LULAC v. Perry*. In that case, the Supreme Court stated that (1) partisan gain was not necessarily the "sole motivation" for the entire redistricting plan, *id.* at 417; (2) the Republican legislature was replacing a court-ordered plan, which had previously entrenched the Democrats, a party on the verge of minority status, *id.* at 416, 419; and (3) the new plan made the "party balance more congruent to statewide party power." *Id.* at 419.

[14] Bill Torpy, *Torpy at Large: Democracy divided should not stand*, THE ATLANTA JOURNAL-CONSTITUTION, Aug. 23, 2017, *available at* http://www.myajc.com/news/local/torpy-large-democracy-divided-should-not-stand/KaxFVEPXsuxkBGpUe7BpeK/.

"subsidiary" standards. *Vieth*, 541 U.S. at 314. In Justice Kennedy's view, that search may be for ways of quantifying the effect of the gerrymander. And, as discussed above, in some cases such quantification may corroborate the invidiousness of the line-drawing. However, because partisan gerrymander cases come in so many different forms, there is no need for the Court to announce a single standard – other than invidiousness – to govern these cases.

Indeed, it would be a mistake to do so, because one subsidiary standard cannot possibly fit all gerrymanders. The same subsidiary standards cannot apply to a statewide redistricting on the heels of a census cycle that will apply to a mid-decade manipulation of the lines of a single district. The courts, guided by general standards, may devise the subsidiary standards on a case-by-case basis, as they evolve over time, precisely the way other constitutional jurisprudence has developed.

This is what happened in the cognate area of one person, one vote cases after *Baker v. Carr*, 369 U.S. 186 (1962). In *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court declined to employ a specific substantive standard in the course of concluding that Alabama's apportionment plans violated the Equal Protection Clause, instead simply declaring that "the deviations from a strict population basis are too egregious . . . to be constitutionally sustained." 377 U.S. at 568-69. While Chief Justice Warren declared in *Reynolds* that "mathematical nicety is not a constitutional requisite" when adjudicating one person, one vote cases under the

Equal Protection Clause, *id.* at 569, the Court would later reverse course and determine that certain numerical thresholds were in fact appropriate.[15] By not defining the limits of the one person, one vote principle at the outset, *Carr* and *Reynolds* gave lower courts latitude to rein in severe malapportionment in the short term while allowing the Court to develop workable and easily-communicable legal standards in future cases.

In this context, the focus on the invidiousness of the decision making relieves the courts of the need to adopt a one-size-fits-all set of subsidiary standards. The stronger the evidence of invidiousness, the sounder the basis for the Court to determine that the impact of the line-drawing is caused by an unconstitutional intent to minimize the voting strength of a particular political element.

CONCLUSION

Partisan gerrymanders are incompatible with our democracy and deny voters a meaningful opportunity to elect candidates of their choice. For the foregoing

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[15] *Harris v. Arizona Indep. Redistricting Com'n*, 136 S. Ct. 1301, 1305 (2016) (holding that "[b]ecause the maximum population deviation between the largest and the smallest district is less than 10%, the appellants cannot simply rely upon the numbers to show that the [state legislative] plan violates the Constitution."); *White v. Weiser*, 412 U.S. 783, 790 (1973) (even small congressional district population deviations are allowed only in "unavoidable" instances).

reasons, the Court should hold that partisan gerrymandering claims are justiciable and subject to a judicially-manageable standard. That standard should be based on the principle that invidious discrimination against a group of voters based on their presumed political persuasion is prohibited under the Constitution. The invidiousness standard is widely accepted and can be applied in a sufficiently broad and flexible manner to cover the variety of gerrymanders being employed by political parties today, including the "pinpoint" gerrymander enacted by the Georgia legislature in 2015.

Respectfully submitted,

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